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In The

Supreme Court of the United States

October Term, 1995

MARTIN COLLINGS, RICHARD JAMES BEAMER, JAMES C. BANES, MICHAEL SHAY, GUY YEAGER, BILLY R. STAGGS,

Petitioners,

vs.

LONGVIEW FIBRE COMPANY,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Should the Court grant certiorari to review an opinion the Ninth Circuit Court of Appeals that the Americans with Disability Act (ADA) allows an employer to discharge employees for prior drug use even though the employee is actively in or has successfully completed a drug rehabilitation program and is drug free at the time the employee is fired? [42 U.S.C. § 12114(a), (b)]. This is an issue of first impression under the ADA.

LIST OF PARTIES

Petitioners for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit are Martin Collings, Richard James Beamer, James C. Banes, Michael Shay, Guy Yeager and Billy R. Staggs.

Respondent is Longview Fibre Company.

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No.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Martin Collings, Richard James Beamer, James C. Banes, Michael Shay, Guy Yeager and Billy R. Staggs respectfully pray that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit as entered on August 14, 1995.

OPINIONS BELOW

The United States District Court for the Eastern District of Washington entered a Summary Judgment of Dismissal orally ruling that prior drug conduct may serve as a grounds for dismissal even though employees are drug free and had successfully completed or were in drug rehabilitation programs (App. 20a-29a). That decision was affirmed on August 14, 1995 by the United States Court of Appeals for the Ninth Circuit (App. 1a-19a).

STATEMENT OF JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was entered on August 14, 1995. This Court's jurisdiction to consider this petition from a final decision of the United States Court of Appeals is pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 12114. Illegal use of drugs and alcohol

(a) Qualified individual with a disability

For purposes of the subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.

(b) Rules of construction

Nothing in subsection (a) of this section shall

be construed to exclude as a qualified individual with a disability an individual who

> (1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

STATEMENT OF THE CASE

Each of the six (6) petitioners before the Court was employed by respondent Longview Fibre at its corrugated paper plant located in Yakima, Washington. Each petitioner was fired in November, 1992 following an undercover "sting" operation. Each of the petitioners was drug free at the time of their termination and were either actively participating in a drug

rehabilitation program or had successfully completed a drug rehabilitation program prior to the time of their termination. Respondent concedes that each petitioner was discharged for selling and/or buying and/or possessing and/or using drugs on company premises and/or returning from lunch breaks after using drugs. Each petitioner conceded some prior drug involvement at work except Mr. Yeager and all petitioners were drug free by actual testing that was either a part of the drug rehabilitation program that they were in or that they arranged on their own at the time of their firing. The drug usage of petitioners had terminated anywhere from six weeks prior to termination up to eighteen months prior to termination.

The Americans with Disabilities Act (ADA) 42 U.S.C. § 12101, *et seq.* deals directly with the illegal use of drugs as follows:

> **§ 12114. Illegal use of drugs and alcohol**
>
> **(a) Qualified individual with a disability**
>
> For purposes of the subchapter, the term "qualified individual with a disability" shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> **(b) Rules of construction**
>
> Nothing in subsection (a) of this section shall be construed to exclude as a qualified individual with a disability an individual who
>
> (1) has successfully completed a

> supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;
>
> (2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or
>
> (3) is erroneously regarded as engaging in such use, but is not engaging in such use;
>
> except that it shall not be a violation of this chapter for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) or (2) is no longer engaging in the illegal use of drugs.

Each petitioner was a qualified individual with a disability under 42 U.S.C. § 12114(a) because they were drug free when Longview Fibre acted on the basis of "such use". The Court further requires petitioners to meet the *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) shifting burden of going forward with the evidence which is inappropriate under this section of the ADA.

REASONS FOR GRANTING THE WRIT

The Americans with Disabilities Act allows employees with prior drug problems to meet the requirements of a "qualified

individual with a disability" if they are no longer using drugs at the time of the disciplinary conduct and have completed a drug rehabilitation program or are actively participating in a supervised rehabilitation program. The ruling of the United States Court of Appeals for the Ninth Circuit asserts that any prior violation of company rules or policies regarding drug usage or possession can be the basis for termination even when first discovered a year or more after an employee has successfully completed a drug rehabilitation program and has been drug free up to the time of disciplinary action.

Nothing in the ADA prohibits an employer from terminating an employee for current drug use or current violations of company drug policy. Once an employee has taken the affirmative steps to deal with a drug problem the ADA compels that he cannot be terminated for prior drug usage or violation of company policies.

42 U.S.C. § 12114(b) allows an employer to administer drug tests to ". . . individuals described in paragraph (1) or (2) . . ." to insure the employee remain drug free.

The ruling of the district and circuit courts emasculates the legitimate goal of allowing drug abusers that have confronted and *successfully* dealt with their problem be protected from termination if that prior conduct is discovered. Even the Title of 42 U.S.C. § 12114(a), "Past Drug Usage — Rehabilitation" speaks to the intent of Congress in adopting this section of the ADA.

Certiorari should be granted on this issue of first impression both in the circuits and before this Court.

CONCLUSION

WHEREFORE, petitioners respectfully pray that a Writ of Certiorari be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED AUGUST 14, 1995

FOR PUBLICATION

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 94-35410
D.C. No. CV-93-03090-FVS

MARTIN D. COLLINGS,

Plaintiff-Appellant,

v.

LONGVIEW FIBRE COMPANY,

Defendant-Appellee.

OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Fred L. Van Sickle, District Judge, Presiding

Appendix A

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94-35418
94-35424
94-35425
94-35426
94-35431
94-35434

D.C. No.
CV-93-03089-WFN
CV-93-03088-WFN
CV-93-03093-WFN
CV-93-03094-WFN
CV-93-03095-WFN
CV-93-03091-WFN
CV-93-03092-WFN

RICHARD JAMES BEAMER; JAMES C. BANES; JAMES MILLER; MICHAEL SHAY; GUY YEAGER; BILLY R. STAGGS; BARRY J. REEVES,

Plaintiffs-Appellants,

v.

LONGVIEW FIBRE COMPANY,

Defendant-Appellee.

OPINION

Appendix A

Appeals from the United States District Court
for the Eastern District of Washington
Wm. Fremming Nielsen, District Judge, Presiding

Argued and Submitted
June 8, 1995 — Seattle, Washington

Filed August 14, 1995

Before: James R. Browning, Robert Boochever,
and Thomas G. Nelson, Circuit Judges.

Opinion by Judge Boochever

* * *

COUNSEL

David H. Putney, Yakima, Washington, for the plaintiffs-appellants.

Lewis K. Scott, Lane, Powell, Spears, Lubersky, Portland, Oregon, for the defendant-appellee.

OPINION

BOOCHEVER, Circuit Judge

Martin Collings and seven other former employees of Longview Fibre Company ("Longview") appeal the district court's summary judgment in favor of Longview in the employee's consolidated employment discrimination action. The employees allege that Longview wrongfully terminated them for

their drug addiction disability in violation of the Americans with Disabilities Act, 42 U.S.C. §§ 12111-12117, and the Washington Law Against Discrimination, RCW 49.60.180. The district court found that Longview fired the employees, not because of their alleged drug addiction disability, but because of their drug-related misconduct at the workplace, and the court therefore dismissed their claims. We affirm.

FACTUAL BACKGROUND

Each of the eight plaintiffs in this action worked in Longview Fibre Company's box manufacturing plant in Washington. The plant contained large, fast-moving machinery which, when not handled properly, posed a risk of serious injury.

Longview imposed strict rules prohibiting employee use of drugs at the workplace. As a federal government contractor, Longview was governed by the Drug-Free Workplace Act, 41 U.S.C. §§ 701-707.[1]

In May 1992, Longview hired the outside firm of Krout & Schneider to investigate rumors of drug activity among the employees in the plant. Stephen Murti, an undercover operative, worked at the plant for six months and recorded his daily personal observations of drug activity.

On November 10-12, 1992, after the undercover investigation was completed, eighteen employees, including the eight plaintiffs, were interviewed at the plant by representatives

---

1. That Act requires government contractors to certify that they "will provide a drug-free workplace by ... notifying employees that the unlawful ... distribution, dispensation, possession, or use of a controlled substance is prohibited in the person's workplace" and by warning employees that they must abide by those terms "as a condition of employment." 41 U.S.C. § 701(a)(1)(A), (D).

of Krout & Schneider. Each employee was asked to reveal candidly his own involvement with drugs at the plant and his knowledge of the involvement of others. The employees were asked to prepare sworn written statements in their own writing summarizing the statements they had made about their own drug activities and the activities of other employees. Longview management representatives then entered the room, and the employees tape-recorded their written statements in an "oral declaration" and answered further questions posed by the interviewers. The employees confirmed that the interviews had been conducted fairly and that no promises of continued employment had been made.

The investigators prepared reports on each employee which summarized the information gathered as a result of Murti's personal undercover observations, the employee's own admissions during the interviews, and other employees' sworn statements. After reviewing these reports, Longview decided to terminate seventeen of the eighteen employees interviewed including the eight plaintiffs, for alleged drug-related misconduct at the workplace.

Five of the eight plaintiffs admitted their misconduct in their sworn statements taken during the interviews.[2] The three men who did not were Barry Reeves, Michael Shay, and Guy Yeager. Barry Reeves denied ever using, buying, or selling drugs, but Murti reported observing Reeves purchase marijuana at the workplace on Nov. 6, 1992, and several of the other employees

---

2. James Banes admitted breaking "company rules by smoking marijuana in company parking lot and pallet area, during lunch & work" and selling marijuana "on company property and time." Richard Beamer admitted "smoking marijuana in the company parking lot "and then "return[ing] to work under its influence." Martin Collings recalled "smoking marijuana . . . 20 times during lunch and return[ing] to work." James Miller and Billy Staggs admitted similar conduct.

indicated in their sworn statements that Reeves had been involved in drug-related activities at the plant. Michael Shay refused to make a written statement. The interviewers stated in their affidavits, however, that Shay verbally confessed his drug-related misconduct and detailed his use and sale of marijuana at work. Other employees confirmed that Shay had been involved in work-place drug activities.

Guy Yeager did not admit any misconduct, nor was he observed by Murti to be engaged in misconduct at the plant. Yeager denied ever having used, bought, or sold drugs on company property. Several of the other employees, however, indicated in their sworn statements that Yeager had engaged in drug-related misconduct at work. Longview decided not to terminate Yeager right away and continued its investigation concerning him. Shortly thereafter, Yeager pled guilty in state court to a felony charge of possessing marijuana with intent to deliver. Because his plea was contrary to his earlier denials of drug involvement, Longview concluded that Yeager had lied about his drug activities and discharged him.

The eight plaintiffs brought this action under the Americans with Disabilities Act and the Washington Law Against Discrimination, alleging that they suffered from a drug addiction disability and that Longview wrongfully terminated them on the basis of that disability. They obtained expert opinions from a psychiatrist and a drug rehabilitation counselor who concluded that the employees met the diagnostic criteria for "substance abuse disorder" and that they probably were "disabled" as described by the statutes.

Longview moved for summary judgment, arguing that there were no genuine issues of material fact. After a hearing, the district court agreed and found that the employees were

discharged because of their drug-related misconduct at work, and not because of their alleged substance abuse disability. The court therefore dismissed their claims. The employees now appeal.

STANDARD OF REVIEW

A grant of summary judgment is reviewed de novo. Viewing the evidence in the light most favorable to the nonmoving party, the court must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law. *Jesinger v. Nevada Fed. Credit Union*, 24 F.3d 1127, 1130 (9th Cir. 1994).

DISCUSSION

I. *Americans with Disabilities Act*

The Americans with Disabilities Act ("ADA") prohibits employment "discriminat[ion] against a qualified individual with a disability because of the disability of such individual." 42 U.S.C. § 12112(a). The term "qualified individual with a disability" does "not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use." 42 U.S.C. § 12114(a). The ADA does, however, protect individuals who have successfully completed or are participating in a supervised drug rehabilitation program and are no longer using illegal drugs, as well as individuals who are erroneously regarded as using drugs when in fact they are not. *See* § 12114(b).

In the instant case, the employees argue that they were "disabled" and entitled to protection from discrimination under the ADA. Seven of them contend that although they had drug abuse problems in the past, they were all "drug-free" at the time

of their discharges and had either completed drug rehabilitation programs or were in the process of being rehabilitated. The eighth plaintiff, Barry Reeves, argues that he never engaged in any drug use and was erroneously perceived as engaging in such use. The plaintiffs thus maintain that they were qualified individuals with a disability under § 12114(b) and that Longview discriminated against them by discharging them on the basis of their drug addiction disability.

Even assuming, without deciding, that the plaintiffs had such a disability, we are not persuaded by their argument. The ADA specifically provides that employers have the right to prohibit drug-related misconduct at the workplace. Section 12114(c) states that an employer:

> (1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;
>
> (2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;
>
> (3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et. seq.);
>
> (4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior

> is related to the drug use or alcoholism of such employee; . . . .

The regulations accompanying the ADA indicate that employers "may discharge or deny employment to persons who illegally use drugs, on the basis of such use, without fear of being held liable for discrimination." 29 C.F.R. § 1630.3 App.

Courts have recognized a distinction between termination of employment because of misconduct and termination of employment because of a disability. In *Little v. FBI*, 1 F.3d 255, 259 (4th Cir. 1993), the court found that an alcoholic employee was discharged because of his misconduct of being intoxicated while on duty, rather than because of his alcoholism handicap, and that therefore, the discharge did not violate the Rehabilitation Act.[3] The court noted that alcoholics and drug addicts are not exempt from reasonable rule of conduct, such as prohibitions against the possession or use of alcohol or drugs in the workplace, *id.* at 258, and employers must be allowed to terminate their employees on account of misconduct, "irrespective of whether the employee is handicapped." *Id.* at 259.[4]

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3. Although the plaintiffs here brought their claim under the ADA, cases involving claims under the Rehabilitation Act are instructive. The ADA defines a disability in substantially the same terms as the Rehabilitation Act defined a handicap (now disability). The ADA enlarges the scope of the Rehabilitation Act, however, by extending its prohibition against disability discrimination to private employers. The legislative history of the ADA indicates that Congress intended judicial interpretation of the Rehabilitation Act be incorporated by reference when interpreting the ADA. *See* Laura F. Rothstein, *Disabilities and the Law* § 3.12 (1992).

4. *See also Flynn v. Raytheon Co.*, 868 F. Supp. 383, 387 (D. Mass. 1994) ("While the ADA . . . protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job."); *Wilber v.*

(Cont'd)

Similarly, in this case, Longview terminated the employees on the basis of their drug-related misconduct. Five of the eight plaintiffs admitted in their interviews that they had violated company rules by buying, selling, or using marijuana at the workplace or by returning to work under its influence. In their brief in opposition to Longview's motion for summary judgment, the plaintiffs reiterated this fact: "the plaintiffs concede drug usage, drug purchases, and drug sales in a variety of circumstances and in many cases on company property." Thus, with respect to those employees, Longview was entitled to act as it did in discharging them because their misconduct, rather than any alleged disability, was the reason for their discharge. *See Little*, 1 F.3d at 258-59; *Grimes v. U.S. Postal Serv.*, 872 F. Supp. 668, 675 (W.D. Mo. 1994) (granting summary judgment to employer who discharged employee "because he possessed and distributed illegal drugs," not because of his alleged marijuana addiction disability); *Richardson v. U.S. Postal Serv.*, 613 F. Supp. 1213, 1215 (D.D.C. 1985) (granting summary judgment to employer where employee "was discharged for his criminal conduct, not because of alcoholism or poor job performance due to alcohol.").

Moreover, the ADA specifically states that individuals who are "currently engaging in the illegal use of drugs" are not protected under the statute. *See* § 12114(a). The employees argue that they were not "currently engaging" in such use when Longview fired them. They emphasize the fact that they were "drug-free" at the time of their discharge. A number of them took

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(Cont'd)

Brady, 780 F. Supp. 837, 840 (D.D.C. 1992) ("The Rehabilitation Act is designed to put individuals with disabilities on equal footing with non-disabled people in regards to [employment] decisions . . . It is not designed to insulate them from disciplinary actions which would be taken against any employee regardless of his status.").

and passed a drug test shortly after their discharge to prove that they were not "currently engaging in the illegal use of drugs."

As the regulations indicate, however, "the term 'currently engaging' is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct." 29 C.F.R. § 1630.3 App. Therefore, the fact that they may have been drug-free on the day of their discharge is not dispositive. Their own admissions of drug involvement during the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct.

The three plaintiffs who denied in their interviews, or refused to admit in a sworn written statement, that they had ever used drugs at the workplace were Guy Yeager, Michael Shay, and Barry Reeves.[5] Several of the other employees, however, stated that all three men were heavily involved in the use and sale of marijuana on company property. In Guy Yeager's case, shortly after his interview, he pled guilty to possession of marijuana with intent to deliver. Longview therefore discredited Yeager's earlier denials of drug involvement, credited the other employees' statements, and discharged him on the basis of misconduct. In his affidavit in opposition to Longview's motion for summary judgment, however, Yeager again specifically denied ever having

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5. These three plaintiffs brought grievance claims under their labor contract, alleging that they were discharged without just cause in violation of that contract. The claims went to arbitration, and after a three-day hearing, the arbitrator found that Longview had just cause for terminating them because of their drug-related activity at the workplace. Although the arbitrator's decision is not dispositive of statutory rights, we note that it may be considered. *See Criswell v. Western Airlines, Inc.*, 709 F.2d 544, 548-49 (9th Cir. 1983), *aff'd.*, 472 U.S. 400 (1985).

engaged in drug-related misconduct at work. Michael Shay also denied in his affidavit engaging in such conduct.

Yeager and Shay in essence maintain that they never committed the misconduct for which they were fired and that there exists a genuine issue of fact as to whether the misconduct ever occurred. Unless they can show that Longview's explanation for their discharge was a pretext for disability discrimination, however, they have presented no triable issue under the ADA. *See Smith v. Barton*, 914 F.2d 1330, 1340 (9th Cir. 1990), *cert. denied*, 501 U.S. 1217 (1991) (once employer offers legitimate, nondiscriminatory reason for discharge, burden shifts to employees to demonstrate that articulated reason is pretext for handicap discrimination); *Steckl v. Motorola, Inc.*, 703 F.2d 392, 393 (9th Cir. 1983).

In *Steckl*, the court held that summary judgment for an employer was appropriate on an employee's claim that he was not promoted because of his age. After the employer offered a legitimate, nondiscriminatory reason for its decision, i.e. the employee's lack of experience and not his age, the employee was required to produce "specific, substantial evidence of pretext" in order to avoid summary judgment. 703 F.2d at 393. The court held that a "party opposing a summary judgment motion must produce *specific* facts showing that there remains a genuine factual issue for trial and evidence significantly probative as to any [material] fact claimed to be disputed." *Id.* (emphasis in original) (quotations omitted).

Yeager and Shay have not come forward with any specific allegations of pretext. Even if it is assumed that they had a medically cognizable drug addiction disability, there was no showing that Longview had any knowledge of it and that Longview fired them because of it, rather than because of

misconduct. There is no indication that Yeager and Shay were treated differently from other employees who engaged in similar conduct. Therefore, they have not produced sufficiently specific facts of pretext to avoid summary judgment. *See Landefeld v. Marion Gen. Hosp.*, 994 F.2d 1178, 1181 (6th Cir. 1993) (granting summary judgment to employer in employee's Rehabilitation Act action because employee failed to show that the nondiscriminatory reason offered by employer for employee's discharge was pretextual; there was no indication that employer knew of employee's disability or fired him solely because of his disability). "[M]ere assertions that [an employer] had discriminatory motivation and intent . . . [is] inadequate, without substantial factual evidence, to raise . . . a genuine issue of material fact as to pretext in order to avoid summary judgment." *Steckl*, 703 F.2d at 393.

In Barry Reeves' case, however, Reeves flatly denied ever having used drugs, whether on or off company property. Although Murti stated that he had personally observed Reeves purchasing marijuana on Nov. 6, 1992, Reeves maintained that from Murti's vantage point, he could not have seen Reeves exchanging money for drugs. In his affidavit in opposition to Longview's summary judgment motion, Reeves stated. "I simply do not use drugs."

Like Yeager and Shay, Reeves essentially maintains that he never engaged in the misconduct for which he was fired and that there is a genuine issue of fact as to whether the misconduct ever occurred. Reeves further argues, however, that he never had a drug addiction problem, but was erroneously perceived by Longview as having one. Thus, Reeves maintains that he was a qualified individual with a disability under § 12114(b)(3) because he was erroneously regarded as engaging in the use of illegal drugs.

As indicated above, however, unless Reeves can show that the nondiscriminatory reason offered by Longview to explain its termination decision, i.e. that Reeves engaged in misconduct, was a pretext for disability discrimination, there is no triable issue under the ADA. In Reeves' affidavit in opposition to the summary judgment motion, he stated that Longview did perceive Reeves as having a drug problem and discharged him for that reason:

> I was specifically told that I was fired for use of marijuana, and for buying and selling marijuana and coming back to work under the influence. They clearly told me they regarded me as having a significant drug problem . . . . If they considered me an unsafe employee because of the use of drugs and my alleged "drug problem", they must have believed I was drug-dependent.

Reeves therefore suggests that the real reason for his termination was an erroneous perception that he had a disability when in fact he did not. We believe, however, that Reeves' conclusory assertions that Longview must have had a discriminatory intent in discharging him, without other facts to substantiate that claim, are insufficient to avoid summary judgment. Because of safety concerns involving the large, fast-moving machinery at the plant, the rule against alcohol and drug-related misconduct was a justified occupational standard. Reeves' discharge resulted from Longview's belief that he violated that rule on specific occasions. Terminating him on the basis of those isolated, specific incidents is not the equivalent of perceiving that he suffered from a disability and was fired solely because of that perceived condition.

Therefore, we find that the district court properly granted Longview's summary judgment motion with respect to the plaintiffs' ADA claims.

II. *Washington Law Against Discrimination*

The Washington Law Against Discrimination provides that "[i]t is an unfair practice for any employer . . . [t]o discharge or bar any person from employment because of . . . the presence of any sensory, mental, or physical handicap [now disability]." RCW 49.60.180.[6] The regulations accompanying the statute define those terms:

> (a) A condition is a "sensory, mental, or physical handicap" if it is an abnormality and is a reason why the person having the condition did not get or keep the job in question. . . . In other words, for enforcement purposes a person will be considered to be *handicapped* by a sensory, mental, or physical condition if he or she is *discriminated against because of the condition* and the condition is abnormal.
>
> (b) "The presence of a sensory, mental, or physical handicap" includes, but is not limited to circumstances where a sensory, mental, or physical condition:

6. In 1993, the Washington statute was amended to substitute the term "disability" for "handicap." The regulations accompanying the statute, however, continue to employ the term "handicap." We use the terms interchangeably in this section, noting, however, that "disability" is the preferred term.

(i) Is medically cognizable or diagnosable;

(ii) Exists as a record or history; or

(iii) Is perceived to exist, whether or not it exists in fact.

WAC 162-22-040(1)(a),(b) (emphasis in original). The definition of handicap therefore "requires factual findings of both (1) the presence of an abnormal condition, and (2) employer discrimination against the employee plaintiff *because* of that condition." *Doe v. Boeing Co.*, 846 P.2d 531, 536 (Wash. 1993) (en banc) (emphasis in original).

In this case, the plaintiffs argue that they created a factual issue as to whether they were handicapped as defined by the Washington statute. They maintain that the district court erred in granting summary judgment to Longview because the question whether they were handicapped must be determined by a jury. In support of their argument, the plaintiffs cite *Phillips v. City of Seattle*, 766 P.2d 1099, 1103 (Wash. 1989) (en banc), in which the court stated that "the inquiry under WAC 162-22-040(1)(a) as to whether a person is 'handicapped' [is] factual in nature and proper for submission to a jury."

The plaintiffs fail to acknowledge however that "a trial court may decide a factual issue as a matter of law if there is only one conclusion that reasonable minds could reach." *Michelson v. Boeing Co.*, 826 P.2d 214, 216 (Wash. Ct. App. 1991). Under Washington law, "[a]lthough the question of whether a condition is a handicap is generally one for the jury, [the plaintiff] is still required to present credible evidence of that condition" and "that the handicap was the reason for the discharge." *Simmerman v. U-Haul Co.*, 789 P.2d 763, 765 (Wash. Ct. App. 1990).

Even assuming that the plaintiffs had a drug addiction problem and that it constituted an "abnormal condition" under the statute, the plaintiffs have not shown that they were discriminated against *because* of that condition. The plaintiffs admitted that they had engaged in drug-related misconduct at the workplace, and Longview maintained that their violation of company rules prohibiting such misconduct was the reason for their discharge. Therefore, the plaintiffs' discharge did not represent disability discrimination in violation of RCW 49.60.180. *See Klein v. Boeing Co.*, 847 F. Supp. 838, 843 (W.D. Wash. 1994) (plaintiff's claim under RCW 49.60.180 "must fail as a matter of law because whether or not [he] can show that he suffered from an 'abnormal condition,' he has not presented any evidence which indicates that Boeing discharged him *because* of any abnormal condition"). The "[d]ischarge of an employee for violation of a workplace rule does not constitute discrimination based upon an employee's alleged disability." *Id.*; *see also Doe*, 846 P.2d at 536 (discharge of employee with gender dysphoria based not on "her abnormal condition but on her refusal to conform with [employer] directives on acceptable attire" does not constitute handicap discrimination under RCW 49.60.180).

As for those plaintiffs like Guy Yeager, Michael Shay, and Barry Reeves, who denied ever having committed the misconduct for which they were discharged, the analysis is the same as it was under the ADA. Once Longview asserted its nondiscriminatory reason for firing them, they had an obligation to present specific facts to suggest that Longview's explanations were mere pretext. *See Kastanis v. Educational Employees Credit Union*, 859 P.2d 26, 30 (Wash. 1993) (en banc), "If there is no evidence of pretext, the defendant is entitled to dismissal as a matter of law. If there is evidence of pretext, the case must go to the jury." *Id.* (citations omitted).

Appendix A

As indicated above, Yeager and Shay did not present facts to indicate that Longview discharged them solely because of an alleged disability, rather than because of misconduct. The speculations of Barry Reeves, who maintains that Longview erroneously perceived him as engaging in illegal drug use, are insufficient to create a triable disability discrimination claim.

In a similar case brought under RCW 49.60.180, an employee was terminated because he violated company rules prohibiting intoxication on the job. In his affidavit, the employee claimed that he "never drank on the job" and that he "was never intoxicated at work." *Brady v. Daily World*, 718 P.2d 785, 786 (Wash. 1986) (en banc). The employer's records indicated, however, that he appeared to be under the influence of alcohol a number of times while at work. The Washington Supreme Court rejected the employee's argument that he was discriminated against because the employer perceived that his alleged alcoholism was a disability. The court found that safety factors involving other co-workers made "freedom from intoxication . . . a bona fide occupational qualification." *Id.* at 789. The court therefore held that the employee did not have a claim under the Washington statute:

> Plaintiff's discharge resulted from the employer's belief that plaintiff violated the rule against intoxication on specific occasions. These isolated, specific incidents are not the equivalent of perceiving that plaintiff suffered the disease of alcoholism and that he was discharged for that perceived condition. Summary judgment on the claim was proper.

Id.

Likewise, in this case, Reeves' discharge resulted from Longview's belief that he violated company rules against drug-related misconduct on a number of occasions. There is no real indication that Longview actually perceived Reeves as suffering from a drug addiction disability and then terminated him because of that perception. Thus, Reeves has not satisfied his burden of producing specific facts to suggest pretext. Longview, therefore, is entitled to dismissal as a matter of law. *See Kastanis*, 859 P.2d at 30.

Accordingly, we find that the district court did not err in granting Longview's summary judgment motion with respect to the plaintiffs' claims under Washington law.

CONCLUSION

We affirm the district court's order granting summary judgment in favor of Longview and dismissing the plaintiffs' claims under the ADA and Washington law. Longview terminated the employees on the basis of their admitted misconduct, and not on the basis of their alleged drug addiction disabilities. To the extent any of the plaintiffs denied committing any misconduct, they failed to meet their burden of producing specific facts to indicate that Longview's explanations for terminating them were merely pretextual.

AFFIRMED.

APPENDIX B — DECISION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON DATED MARCH 28, 1994

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

MARCH 28, 1994
SPOKANE, WASHINGTON,
NO. 93-CY-3089-WFN

RICHARD JAMES BEAMER, ET AL.,

PLAINTIFFS,

VS.

LONGVIEW FIBRE CO.,

DEFENDANT.

TRANSCRIPT OF PROCEEDINGS
SUMMARY JUDGMENT MOTIONS

BEFORE THE HONORABLE WILLIAM F. NIELSEN, JUDGE.

ON BEHALF OF PLAINTIFF: DAVID H. PUTNEY
402 NORTH 4TH STREET
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YAKIMA, WA. 98901

Appendix B

ON BEHALF OF DEFENDANTS:

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PORTLAND, ORE. 97204

[Commencing at page 50]

the Act that protects anyone, whether their disability was caused by drugs or anything else, for being terminated for their misconduct, and the Act, in fact, Subsection C explicitly says just the opposite. Thank you .

MR. PUTNEY: May I point one thing out to the court?

THE COURT: Yes, go ahead, Mr. Putney.

MR. PUTNEY: I found the reference in the CFR, it's 29 CFR Section 1630.3, and which is the interpretation of 12114, the last definition where it talks about disability does not include — specifically says psychoactive substance use disorder resulting from current illegal drug use.

THE COURT: Well, we're here on the defendant's motion for summary judgment, and we know under Rule 56, if there is any material issue of fact, a motion has got to be denied, and the court is not in a position to weigh or interpret facts, but just determine as to whether there is any material issue of fact, and if there are any, the motion should be denied; if there are not any, the motion properly should be granted, because the theory of the act and/or the — of the rule and the purpose of the rule is to eliminate cases that should not go forward and should not be presented to a trier of [51] fact.

Appendix B

A material issue of fact, of course, there may be lots of issues of fact that could be material. It has to be the type of fact that logically could have an outcome — have an influence on the outcome of a case, and if there are no such facts in issue, then Rule 56 and the cases that have been cited, particularly by the Supreme Court in recent years, indicate that the motion should be dismissed.

Now, here we have eight plaintiffs and eight separate causes of action, all of which are alleging substantially that they were discharged wrongfully in violation of the Americans with a Disability Act because they were disabled persons, their disability growing out of the prior use of controlled substances, not alcohol, but I gather other types of controlled substances, particularly marijuana.

Plaintiff argues that, and I'll go through each case very briefly, but in each case, assuming there was misconduct in the form of violation of company policy, that misconduct no longer is going on. The prior use of the drugs resulted in the individuals being classified as disabled persons under the Act. Those disabilities existed at the time that Longview terminated their employment.

[52] Plaintiff relies on 42 U.S.C. 12114(A), as suggesting that when the entity acts, those are the words I put in quotes "entity acts," if they are disabled they are qualified persons under the Act and they can't be terminated for that disability. I think it's noteworthy to point out that Longview operates a plant of some kind in the Yakima area that produces corrugated boards of some kind. The work involves the use of machinery, and temperatures, and an environment that creates hazards for employees. The employer at Longview has implemented strict rules which I have briefly summarized.

Appendix B

I think it is fair to state that absolutely prohibit the use or the presence in the work place of drugs, prohibit individuals from being under the influence of drugs or alcohol on the premises, the company's policy is clear that employees that violate those rules can be discharged on the first offense involving drugs. For what it's worth, Longview is also a qualified employer under the Drug Free Work Place Act, 41 U.S.C. 71 et seq., and we discussed briefly the authorities that the Act gives employers, authority to set out and enforce very strict drug policies.

Now, in each of the individual plaintiffs' cases, we have without question misconduct, and I'll [53] just briefly go through some notes that I made as to each, and by making these observations I'm not indicating that what I say is exhaustive. The record that we have here before us on these motions for summary judgment contain other indications of misconduct, and in most cases there is no denial of a misconduct, and Mr. Putney in all candor can't deny it, but does take the position as I've indicated earlier that the conduct that's in question is a result of the disability. In order to be consistent, I guess you have to take the position that there is a disability that existed at the time the employer, Longview, terminated the employment.

But as to Mr. Banes, for example, he's acknowledged that he used drugs on the work place, at lunch time, as recently as July of '92, and now we're talking about an investigation that was culminated in late '92, I think November of '92, and he even indicates that he probably still has the habit because he refers to the fact he'd like to get rid of the habit, which indicates a present tense problem. There is no indication that he's completed or in the process of completing a substance abuse program.

Mr. Beamer also admits using drugs the previous six months, during the lunch hour, returning to work, having these drugs

apparently as recently as two months [54] before this investigation. His statement was corroborated by other employees, conduct that was on the premises. There was a suggestion that he was transacting drug buys and sales, and here again he indicates a desire on his part to quit using drugs which implies current use.

Mr. Collins admitted lunch time use of drugs, returning from work after lunch within two weeks prior to being terminated. Neither he, nor Beaver have any evidence of rehabilitation programs. Mr. Miller likewise admits using drugs at work, at lunch time, within three weeks of being terminated, corroboration from other employees, no indication of a rehabilitation program. Reeves denied all use of drugs apparently, but other employees reported his use during lunch time, being under the influence. This currently was three months prior to the termination. Other employees suggest or give evidence to the effect that there was buying and selling. The investigator, Mr. Murkey (ph), personally observed the transaction involving Mr. Reeves buying or selling, substance abuse on the company property. There was a positive test for use of marijuana.

Mr. Shay denied recent use of drugs, but acknowledged prior use, employee corroboration within [55] eight months of the termination. He acknowledged to the investigator he had used drugs within the last three months, and he again had corroboration by other employees. And he, as indicated, denies current use.

Mr. Staggs acknowledged use of drugs on the work place at lunch, returning to work under the influence as recently as the month of November of '92, corroboration by other employees, no

allegation of participation in or completion of a rehabilitation program, contained statements in his statements such as time to get his life in order, and I've been wanting to quit smoking pot, a clear indication that it's a current problem, not a past history problem.

Yeager does not admit to any use of any drugs, however, employee information — fellow employee information indicates on the job influence within recent months, I think within the past three months before the termination, other employees confirm buying and selling transactions within the three to four to nine months prior to termination. The investigator in his findings indicated he bought marijuana from Yeager. Other employees indicate that Yeager provided drugs for them during the lunch hour at Yeager's home, certainly a violation of the rule that the employer has to keep a drug free work place. An employee may not be using [56] drugs, but if he's aiding and abetting others in using them, that hardly goes to the spirit of a drug free work places and he did plead guilty to possession with intent to deliver and implicating himself criminally on that occasion is a pretty good indication of a violation of the rules.

So this gets to the issue of misconduct, and Mr. Putney, I have difficulty accepting your position that if there is a disability, then prior misconduct can be ignored. I think that the record is clear and there is really no material issue of fact in this record to indicate other than that Longview terminated these eight employees because of their misconduct. Now, if you are right, then the court is wrong. But if you are right, that misconduct is effectively written off, if there is a disability, that's a part of the misconduct and that disability is not current, but has been cured justifying the individual from being a qualified person under the ADA at the time of the firing, then the employer is wrong because

he or it cannot take into account the prior conduct. I have difficulty; I have difficulty with that, and feel that the law cannot be twisted in that vane.

It doesn't seem realistic that Congress would pass a law that would prohibit an employer under [57] circumstances such as that from discharging an employee who has been in clear violation of not only company policy, but public policy and social policy, and other federal policies such as the Drug Free Environment Act when the record is absolutely clear without any question that the misconduct existed and the only justification which is also the basis for the lawsuit that we have here is there was a disability that was part of that misconduct. It continued on. That was discontinued at the time of the termination of the employment, which in this case was November of '92.

So I do believe I understand your position, Mr. Putney, but it doesn't make sense, and the one case that seems to agree, the case of *Little v. FRI,* it's a Fourth Circuit case, and here an FBI agent was terminated for intoxication, and let's assume that was an alcohol problem, not a marijuana problem, but it was an alcoholism problem, and the FBI terminated him, even though he indicated that he no longer was suffering from the problem. We have here an application of the Rehabilitation Act, but the court stated, and I think it's kind of an interesting quote, based on the foregoing authority and based on no lesser authority than common sense, it is clear that an employer subject to the Rehabilitation Act must be permitted to terminate [58] its employee on account of egregious misconduct irrespective of whether the employee is handicapped."

There again to accept plaintiff's position in this case would not only overrule the law of common sense, but the kind of case

we had in Little involving the Rehabilitation Act, which specifically acknowledges that misconduct can be justification for termination even though there is that handicap, which now, of course, gets us into the Washington Act, which instead of referring specifically to a disability, it calls it a handicap. But if the direct cause of the, or the justification or the bases of the termination is not the handicap, but misconduct, which is the situation that we have involved in that *Boeing* (ph) case, I forget the plaintiff's first name —

MR. PUTNEY: Transvestite.

THE COURT: It was that sex change case.

MR. PUTNEY: I think the Pearl (ph) case.

THE COURT: Yes, you pinpointed it. It was a dress code violation, which was a misconduct, and knowledge, not acknowledging the fact that his or her condition, I don't want to refer to it as a medical condition because I don't know what kind of condition you call it —

MR. PUTNEY: Psychiatric.

[59] THE COURT: — was a handicap, that's a given. But there was misconduct that was the justification for and the basis of the discharge, and even though that person had a handicap, when we have the basis of the discharge being the misconduct, then it's a legitimate discharge, and I think that's what we have here, and I don't think there is any material issue of fact in that regard, that the basis for the discharge in all those cases was the misconduct. So I don't need to really find whether or not these plaintiffs had disabilities that would give them protection or have them classified as protected persons under the ADA.

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My determination is that the purpose of the discharge or the justification of the discharge was the misconduct, and — but I might add that I find it difficult in this case, in these cases — I would find it difficult, I think, to determine that these individuals would enjoy the protection of the Act. I feel that more likely than not that they would not be qualified because of their illegal use of drug activity, which would exempt them from protection under the Act, but the real basis for my determination is, as I said a moment ago, is the discharge being based on misconduct. I know it's difficult, but I think when you look at all these Acts, particularly the ADA, the result makes [60] sense.

So for that reason the defendant's motion as to all, individually all plaintiffs' cases is granted, and the cases are dismissed.

MR. PUTNEY: Just for the record, Your Honor, it's on the basis that the misconduct, regardless of when it occurred, was sufficient to justify a discharge.

THE COURT: Well, we know when it occurred in each case. The record makes it clear that the misconduct occurred in each case within a reasonable period of time prior to the actual termination. Information was gleaned from during the investigation over a period of time, and I find that in every single case the misconduct was not so far into the history, past history that it would suggest that the employer acquiesced or condoned it.

It's conduct that is in every case reasonably current, in some cases more current than others, in some cases within weeks, other cases within six, eight, nine months. But in all cases sufficiently current, and in no case do I feel that the employer sat on the

knowledge without acting, and by so doing acquiesced, or become estopped from terminating the employee.

(Whereupon, the hearing concluded.)

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF WASHINGTON DATED MARCH 29, 1994

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

NO. CY-93-3088-FVS
CY-93-3089-WFN
CY-93-3090-FVS
CY-93-3091-FVS
CY-93-3092-WFN
CY-93-3093-WFN
CY-93-3094-WFN
CY-93-3095-FVS

JAMES C. BANES, RICHARD JAMES BEAMER, MARTIN D. COLLINS, BILLY R. STAGGS, BARRY J. REEVES, JAMES E. MILLER, MICHAEL SHAY, GUY E. YEAGER,

Plaintiffs,

-vs-

LONGVIEW FIBRE COMPANY,

Defendant.

A hearing on defendant's Motion for Summary Judgment was held March 28, 1994. Defendant was represented by Lewis Scott; plaintiffs were represented by David Putney. Having reviewed the file and the parties' briefing, heard argument of counsel, and being fully advised, this Order is entered to memorialize the court's oral ruling. Accordingly,

Appendix C

IT IS ORDERED that defendant's Motion for Summary Judgment, **CY-93-3088 Ct. Rec. 8, CY-93-3089 Ct. Rec. 10, CY-93-3090 Ct. Rec. 8, CY-93-3091 Ct. Rec. 9, CY-93-3092 Ct. Rec. 10, CY-93-3093 Ct. Rec. 10, CY-93-3094 Ct. Rec. 9,** and **CY-93-3095 Ct. Rec. 8,** is **GRANTED** and the above eight cases are **DISMISSED.**

The Clerk is directed to file this Order, provide copies to counsel and to **CLOSE THESE FILES.**

DATED this 29 day of March, 1994.

s/ Wm. Fremming Nielsen
WM. FREMMING NIELSEN
UNITED STATES DISTRICT JUDGE

Supreme Court, U.S.
FILED
DEC 1 1995
OFFICE OF THE CLERK

(2)

No. 95-764

In The

Supreme Court of the United States

October Term, 1995

MARTIN COLLINGS, RICHARD JAMES BEAMER, JAMES C. BANES, MICHAEL SHAY, GUY YEAGER, BILLY R. STAGGS,

Petitioners,

v.

LONGVIEW FIBRE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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December 1, 1995

27 pp

QUESTION PRESENTED

Whether the Americans With Disabilities Act ("ADA"), 42 USC § 12101, et seq., prohibits the discharge of employees because of their drug-related misconduct at the workplace, even though they may be within the ADA's protected class of persons with a disability caused by prior illegal drug use and may be rehabilitated and not currently using illegal drugs.

RULE 29.1 LISTING

Longview Fibre Company has no parent companies and no subsidiaries (except wholly owned subsidiaries).

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No. 95-764

In The

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MARTIN COLLINGS, RICHARD JAMES BEAMER, JAMES C. BANES, MICHAEL SHAY, GUY YEAGER, BILLY R. STAGGS,

Petitioners,

v.

LONGVIEW FIBRE COMPANY,

Respondent.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Respondent Longview Fibre Company ("Longview") respectfully requests that this Court deny the petition for a writ of certiorari seeking review of the Ninth Circuit's opinion in this case. That opinion is reported at 63 F.3d 828 (1995).

STATUTORY PROVISIONS INVOLVED

A. Petitioners omit the basic prohibitory provision of the ADA, which is central to this case:

> **"§ 12112. Discrimination**
>
> "(a) **General Rule.** No covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." (42 USC § 12112(a), emphasis added).

B. Petitioners also omit the sections of the ADA's provision on "Illegal use of drugs" which explicitly authorize Longview's discharge of petitioners (§ 12114(c)). The complete relevant ADA provisions are:

> **"§ 12114. Illegal use of drugs and alcohol**
>
> "(a) **Qualified individual with a disability.** For purposes of this title, the term 'qualified individual with a disability' shall not include any employee or applicant who is currently engaging in the illegal use of drugs, when the covered entity acts on the basis of such use.
>
> "(b) **Rules of construction.** Nothing in subsection (a) shall be construed to exclude as a qualified individual with a disability an individual who —

"(1) has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs, or has otherwise been rehabilitated successfully and is no longer engaging in such use;

"(2) is participating in a supervised rehabilitation program and is no longer engaging in such use; or

"(3) is erroneously regarded as engaging in such use, but is not engaging in such use;

except that it shall not be a violation of this Act for a covered entity to adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in paragraph (1) and (2) is no longer engaging in the illegal use of drugs.

"(c) **Authority of covered entity.** A covered entity —

"(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

"(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

"(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);

> "(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; * * *" (42 USC § 12114).

SUMMARY OF ARGUMENT

Petitioners were discharged because of their drug-related misconduct at the workplace. They were not discharged because of any alleged drug-caused disability they claim they had. Petitioners were discharged for selling, buying, possessing and/or using marijuana (and in one case cocaine) at the workplace, and/or for smoking marijuana at lunch and returning to work under its influence. Longview has a strict rule against such misconduct and discharged petitioners immediately after learning of their misconduct. There is no evidence that this reason for petitioners' discharges was pretextual.

Petitioners claim that the ADA prohibits their discharge for such misconduct. They base their claim on ADA Sections 12114(a) and (b) (42 USC § 12114(a) and (b)). They claim they were within the class protected by the ADA because they had a "disability" caused by their use of drugs, and because they had

either completed or were participating in rehabilitation and were not "currently engaging in the illegal use of drugs" when they were discharged.

The district court rejected petitioners' claim and granted summary judgment to Longview. The Ninth Circuit affirmed. They held that the ADA does not prohibit discharge for misconduct, but only for discrimination based on a disability. They held that even assuming (without deciding) that petitioners may have been within the class protected by the ADA because of their alleged drug-caused "disability" and alleged lack of "current" drug use, the uncontradicted evidence showed that petitioners were not discharged because of such alleged disability, but because of their drug-related misconduct at the workplace, and therefore the ADA was not violated by Longview. The Ninth Circuit further ruled that ADA § 12114(c) specifically provides that employers have the right to prohibit drug-related misconduct in the workplace.

No reported decision of any circuit court (or of any district court) has ruled otherwise. The Ninth Circuit ruling is clearly correct from the face of the ADA. It is consistent with the Fourth Circuit's ruling in Little v. FBI, 1 F.3d 55 (4th Cir. 1993), as well as other decisions, under the Rehabilitation Act. It is consistent with the fundamental rule that statutes prohibiting

discrimination based on race, sex, disability or other protected class status, do not immunize such protected class members from discipline based on their misconduct.

According to petitioners' argument, a former drug addict (who is within the protected class) who sold illegal drugs at work prior to his rehabilitation could not be discharged for such misconduct when his employer learned of it, whereas an employee who never used drugs in his life (and who therefore is not within the protected class) could be discharged for such misconduct when his employer learns he sold illegal drugs at work. Nothing in the ADA so provides.

Although this happens to be the first published circuit court decision on this question under the ADA, it has none of the characteristics which would support granting certiorari. It only confirms the clear and obvious meaning of the ADA, in accordance with well-established legal principles under parallel protective legislation.

STATEMENT OF THE CASE

A. The Facts.

Each of the six petitioners was discharged because of his drug-related misconduct in the workplace (SER 25-30, 32).[1] Petitioners were among 17 employees discharged for such misconduct in November 1992, immediately after Longview learned of it. The uncontradicted affidavits show:

Petitioners worked at Longview's box manufacturing plant which has potentially-dangerous machinery (SER 21, 33-34). Longview has strict rules prohibiting the use, presence or being under the influence of drugs at work, and discharges employees for the first offense involving drugs (SER 20-21, 35, 218, 251). Because of rumors of drug activity, Longview engaged outside investigators who conducted a six-month undercover investigation (SER 21). Thereafter, 18 employees were interviewed and 17 of them, including petitioners, were discharged for drug-related misconduct (SER 20-21, 32, 53-56).

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[1] References to support assertions of fact are to the Supplemental Excerpts of Record before the Ninth Circuit ("SER") containing the uncontradicted affidavits and documents setting forth these facts.

Four of the petitioners (James Banes, Richard Beamer, Martin Collings and Billy Staggs) admitted in their sworn, handwritten statements that they had bought, sold, possessed and/or smoked marijuana (and in one case bought and used cocaine) at the plant site, and/or smoked marijuana at lunch and returned to work under its influence.[2] One of the petitioners (Michael Shay) admitted verbally he had purchased marijuana at

---

[2] James Banes admitted "I broke company rules by smoking marijuana in company parking lot and pallet area, during lunch & work," buying marijuana on the company parking lot, and selling marijuana "on company property and time, the last time 2 months ago" (SER 153).

Richard Beamer admitted "Smoking marijuana in the company parking lot, * * * smoking marijuana at lunch off company property about 300 times and then returning to work under its influence, * * * buying * * * marijuana * * * in the company lunch room * * * the last time last week, * * * middling * * * marijuana in various areas of the facility to employees, * * * using cocaine in the company parking lot" and "buying * * * cocaine in various areas" (SER 155).

Martin Collings admitted "Smoking marijuana * * * during lunch and returning to work" on numerous occasions with many other employees, the last time "4 to 5 months ago" and "I also know that because of my involvement I could be terminated" (SER 160-161.

Billy Staggs admitted "Smoking marijuana about 3 times a week in the last 12 months * * * returning to work under its influence, the last time [during the last week] * * * I smoked marijuana about 3 times a week in the last 12 months in the pallet area [on plant premises] * * * I sold marijuana * * * arranged at work * * * I know because of my actions I could lose my job" (SER 191-192).

work, smoked it at work, and provided it to other employees at work.[3] The sworn statements of other employees described drug-related misconduct at the workplace of each petitioner.[4] One of the petitioners (Guy Yeager) did not admit any misconduct and denied any drug involvement either on or off company premises, but the sworn statements of eight employees stated he had sold and bought marijuana at the workplace, and had smoked marijuana at lunch and returned to work under its influence, and the undercover investigator learned Yeager was a reputed source for marijuana[5]; and when Yeager pled guilty to the felony of possessing marijuana with intent to deliver,

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[3] The affidavits of the persons who interviewed Michael Shay state (without contradiction) that Shay told them he had smoked marijuana at work, purchased marijuana at work about ten times (the last three times within the last three months), and provided marijuana to other employees at work (SER 59-61, 64-65, 186-189).

[4] Banes: SER 160, 166, 169, 191; Beamer: SER 157, 160, 167, 169, 357; Collings: 157, 167, 170, 181, 183; Staggs: 160, 169-170, 172, 183, 184; Shay: 160, 167, 169, 363-364; Yeager: 157, 160, 166, 169, 183-184, 191, 306, 365).

[5] SER 69-70, 157, 160, 166, 169, 183-184, 191, 200-211, 306, 365.

Longview concluded he had lied about his drug activities and discharged him.[6]

Petitioners' complaints are all in identical form and concede each of them "was terminated for the use and/or sale of illegal drugs" (Complaints, ¶ IV; SER 2-16). Their brief in opposition to Longview's motion for summary judgment states: "Plaintiffs concede drug usage, drug purchases, drug sales in a variety of circumstances and in many cases on company property" (see Ninth Circuit decision at page 10a of Petitioners' Appendix A, 63 F.3d at 832).[7]

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[6] SER 30-31, 43, 412-414.

In Yeager's subsequent testimony before a labor arbitrator hearing his grievance under the applicable labor contract, in which Yeager claimed he was not discharged for just cause, Yeager admitted he was a dealer in marijuana and frequently sold marijuana to Longview employees who often smoked marijuana at his house during lunch time and returned to work (SER 422, 425, 430, 436-437). The arbitrator found Longview had just cause to terminate Yeager because of his drug-related activities at the workplace (SER 439-494).

[7] Petitioners' statement that "The drug usage of petitioners had terminated anywhere from six weeks prior to termination up to eighteen weeks prior to termination" (Petition, p. 4) is misleading at best. Petitioners were discharged for misconduct (not for "drug usage"), immediately after Longview learned of their misconduct. The misconduct had occurred at least as recently as "2 months ago (Banes' own written statement) (SER 153), "last time last week" (Beamer's own written statement) (SER 155),

(continued...)

The decisions to discharge Petitioners (and the other 11 employees) were all made solely by Longview's general counsel, Robert Arkell, and were based entirely on their misconduct (SER 20, 25-32).[8] Arkell did not even know of any "disability" that petitioners allegedly had; at no time had anyone ever asserted to Arkell (or to anyone else at Longview) that any petitioner had allegedly ever been dependent upon or addicted to any controlled substance (SER 31-31, 39, 44-45).

B. **The Decisions of the District Court and Court of Appeals.**

1. Petitioners (and two others of the 17 discharged employees) each brought separate actions in district court claiming their discharge violated the ADA.[9] The district court granted Longview's motion for summary judgment. It rejected

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[7](...continued)
"4 to 5 months ago" (Collings' own written statement) (SER 160-161), "last time 11-9-92 [within the prior week]" (Staggs' own written statement) (SER 191-192), "three times within the last three months (Shay's verbal statement) (SER 64-65), and "last time 3 months ago" (employee's statement concerning Yeager) (SER 169).

[8] Arkell is an attorney and was a judge of the Washington Superior Court before going to Longview in 1970 (SER 19-20).

[9] Petitioners also alleged pendent claims under Washington's handicap law (RCW 49.60.180), which the courts below also dismissed.

petitioners' argument that the ADA prohibited petitioners' discharge for their drug-related misconduct if petitioners could prove they were within the class protected by the ADA by virtue of their being rehabilitated prior drug users:

> "Now, in each of the individual plaintiffs' cases, we have without question misconduct * * *.
>
> * * * * *
>
> "So this gets to the issue of misconduct, and Mr. Putney, I have difficulty accepting your position that if there is a disability, then prior misconduct can be ignored. I think that the record is clear that there is really no material issue of fact in this record to indicate other than that Longview terminated these eight employees because of their misconduct. * * *
>
> "It doesn't seem realistic that Congress would pass a law that would prohibit an employer under circumstances such as that from discharging an employee who has been in clear violation of not only company policy, but public policy and social policy, and other federal policies * * *.
>
> * * * * *
>
> "* * * So I don't need to really find whether or not these plaintiffs had disabilities that would give them protection or have them classified as protected persons under the ADA." (Decision of U.S. District Court,

Eastern District of Washington, March 28, 1994, at pages 23a, 25a, 27a of Petitioners' Appendix B.)[10]

2. The Ninth Circuit affirmed. Like the district court, it ruled that even assuming petitioners were within the ADA's protected class of persons with a disability, Longview did not violate the ADA when it discharged petitioners because of their drug-related misconduct at the workplace; and that the

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[10] The district court also stated:

> "* * * I feel that more likely than not that [petitioners] would not be qualified because of their illegal use of drug activity, which would exempt them from protection under the Act, but the real basis for my determination is, as I said a moment ago, is the discharge being based on misconduct. * * *" (Id. at p 28a.)

And in response to petitioners' counsel's inquiry of whether "misconduct, regardless of when it occurred, was sufficient to justify a discharge" the district court stated:

> "* * * I find that in every single case the misconduct was not so far into the history, past history that it would suggest that the employer acquiesced or condoned it.
>
> "* * * [I]n no case do I feel that the employer sat on the knowledge [of the misconduct] without acting, and by so doing acquiesced, or became estopped from terminating the employee." (Id. at pp 28a-29a.)

affidavits and petitioners' admissions showed there was no material issue of fact concerning this:

> "Even assuming, without deciding, that the plaintiffs had such a [drug-caused] disability, we are not persuaded by their argument [that Longview violated the ADA by discharging them for their misconduct]. * * *" (Opinion of U.S. Court of Appeals for the Ninth Circuit at page 8a of Petitioners' Appendix A ("Pet App A"), 63 F.3d at 832.)

The court relied on the "distinction between termination of employment because of misconduct and termination of employment because of a disability" (Pet App A p 9a, 63 F.3d at 832, emphasis added), and followed the Fourth Circuit's Rehabilitation Act decision in Little v. FBI, 1 F.3d 255 (4th Cir. 1993) which stated "employers must be allowed to terminate their employees on account of misconduct, 'irrespective of whether the employee is handicapped'" (Ibid). The court found that "Longview terminated the employees on the basis of their drug-related misconduct" (Pet App A p 10a, 63 F.3d at 832) and therefore held there was no violation of the ADA.

The court also relied on ADA § 12114(c), which specifically authorized Longview to "prohibit drug-related

misconduct at the workplace" (Pet App A p 8a, 63 F.3d at 832).[11]

The court ruled that Petitioners had produced no specific facts supporting any claim that Longview's stated reason for discharging them was mere pretext: Four of petitioners (Banes, Beamer, Collings and Staggs) admitted their misconduct throughout, and presented no evidence of pretext. Although Shay later recanted at least some of his verbal admissions, and Yeager did not admit to workplace misconduct, neither presented any evidence of pretext:

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[11] Like the district court (see footnote 10 above), the Ninth Circuit also expressed doubt whether petitioners were within the protected class. The court noted: (1) that ADA § 12114(a) excludes persons "currently engaging in the illegal use of drugs" from the ADA's protected class, (2) that under the Equal Employment Opportunity Commission's regulations, "'the term "currently engaging" is not intended to be limited to the use of drugs on the day of, or within a matter of days or weeks before, the employment action in question. Rather, the provision is intended to apply to the illegal use of drugs that has occurred recently enough to indicate that the individual is actively engaged in such conduct.' 29 C.F.R. § 1630.3 App," and (3) that petitioners' "own admissions of drug involvement during the weeks and months prior to their discharge indicated that they were recently involved in drug-related misconduct" (Pet App A pp 10a-11a, 63 F.3d at 833).

However, the court's decision was that "[e]ven assuming, without deciding" (Pet App A p 8a, 63 F.3d at 832) that petitioners were within the protected class, Longview did not violate the ADA when it discharged them for their drug-related misconduct at the workplace.

"Yeager and Shay have not come forward with any specific allegations of pretext. Even if it is assumed that they had a medically cognizable drug addiction disability, there was no showing that Longview had any knowledge of it and that Longview fired them because of it, rather than because of misconduct. There is no indication that Yeager and Shay were treated differently from other employees who engaged in similar conduct. Therefore, they have not produced sufficiently specific facts of pretext to avoid summary judgment. * * *." (Pet App A pp 12a-13a, 832 F.3d at 834.)[12]

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[12] Petitioners' Statement of the Case asserts: "The Court [of Appeals] further requires petitioners to meet the McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973) shifting burden of going forward with the evidence which is inappropriate under this section of the ADA" (Petition p 5). However, the Ninth Circuit followed the requirement, well established in numerous cases involving adverse employment actions by employers against persons in a protected class, that the claimant must present some substantial evidence of pretext to avoid a summary judgment after the employer has presented substantial evidence of the non-discriminatory reason for the adverse action. The cases cited by the Ninth Circuit below amply illustrate that requirement, Steckl v. Motorola, Inc., 703 F.2d 392 (9th Cir. 1983), Smith v. Barton, 914 F.2d 1330, 1340 (9th Cir. 1990), cert. denied 501 U.S. 1217 (1990), Landefeld v. Marion Gen. Hosp., 994 F.2d 1178, 1181 (6th Cir. 1993).

REASONS FOR DENYING THE WRIT

There is no reasonable basis for granting certiorari in this case:

A. **There are no conflicting decisions or regulations.** There are no contrary reported decisions by either the circuit courts of appeal or the district courts.[13] There is no inconsistency with regulations under the ADA, or with government agency practice.

B. **The decision is clearly correct from the face of the ADA.** Although this is the first court of appeals decision on point under the ADA, the ruling is clear from the face of the ADA:

1. The ADA's basic provision (which petitioners omit) prohibits only "Discrimination * * * because of [a] disability" (42 USC § 12112(a), emphasis added). It does not give to those with a disability a license to engage in misconduct.

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[13] The district court in Massachusetts interpreted the ADA the same as the Ninth Circuit, Flynn v. Raytheon Co., 868 F. Supp. 383, 387 (D. Mass. 1994) ("While the ADA * * * protects an individual's status as an alcoholic, it is clear that a company need not tolerate misconduct such as intoxication on the job").

Petitioners were discharged because of their misconduct. The ADA does not prohibit discharge for misconduct. The Ninth Circuit so ruled.

2. ADA §§ 12114(a) and (b) (on which petitioners rely), show on their face that they do not give drug abusers a license to engage in misconduct, or immunity for their past drug-related misconduct at the workplace. Section (a) only excludes from the protected class persons "currently engaging in the illegal use of drugs when they receive adverse action based on such use"; it reduces drug-users' protections, it does not give to them greater protection than to others. Section (b) only states rules for construing Section (a) — making it clear that Section (a) does not exclude from the protected class rehabilitated (or rehabilitating) prior drug users provided they are not currently drug users, or exclude persons erroneously regarded as being users; it (like Section (a)) also does not give to such persons greater protections than to others. Petitioners' reliance on these sections is misplaced. Prior drug users, just like all persons within the ADA's protected class, can be discharged for their misconduct — just like all persons who are

not within the ADA's protected class. The Ninth Circuit so ruled.

3. ADA § 12114(c) (which petitioners also omit) specifically confirms that employers

"(1) may prohibit the illegal use of drugs and the use of alcohol at the workplace by all employees;

"(2) may require that employees shall not be under the influence of alcohol or be engaging in the illegal use of drugs at the workplace;

"(3) may require that employees behave in conformance with the requirements established under the Drug-Free Workplace Act of 1988 (41 U.S.C. 701 et seq.);[14]

"(4) may hold an employee who engages in the illegal use of drugs or who is an alcoholic to the same qualification standards for employment or job performance and behavior that such entity holds other employees, even if any unsatisfactory performance or behavior is related to the drug use or alcoholism of such employee; * * *" (42 USC § 12114(c)).

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[14] As the Ninth Circuit observed (see Pet App A p 4a, 63 F.3d at 830), Longview is a federal government contractor, and therefore covered by the Drug-Free Workplace Act (SER 21). That Act requires Longview to certify "that it will provide a drug-free workplace" and must prohibit in the workplace the "distribution, dispensation, possession or use of a controlled substance" and requires that employees be notified "that as a condition of employment" the employees must "abide by the terms" of this prohibition (41 USC § 701(a)(1)).

As the Ninth Circuit below states, § 12114(c) thus "specifically provides that employers have the right to prohibit drug-related misconduct at the workplace" (Pet App A p 8a, 63 F.3d at 832). Indeed, the Drug-Free Workplace Act, which applies to Longview and is specifically referenced in ADA § 12114(c)(3), requires "as a condition of employment" that employees not be involved in the "distribution, dispensation, possession or use of a controlled substance" at the workplace (see footnote 14, supra). And ADA § 12114(c)(4) explicitly states that drug users may be held to the "same * * * standards for * * * behavior that [the employer] holds other employees, even if any unsatisfactory * * * behavior is related to the drug use * * * of such employee"; this is exactly what Longview did here, and as ruled by the Ninth Circuit, this was specifically authorized by the ADA.

Where (as here) the statute is clear on its face, and where (as here) the court of appeals' application of it is correct, clear and cogent, no useful purpose would be served by this Court's review.

C. **The decision accords with decisions under the Rehabilitation Act and other statutes prohibiting discrimination against persons in a protected class.** Protective legislation, such as the ADA, prohibits discrimination against persons because of their protected class status. It does not give any person license to engage in misconduct because of membership in a protected class. Thus, the Ninth Circuit followed Little v. FBI, 1 F.3d 255 (4th Cir. 1993), which holds the Rehabilitation Act does not prohibit discharge for the misconduct of being intoxicated while on duty, even if the employee is within that Act's protected class because of his alcoholism (Pet App A pp 9a-10a, 63 F.3d at 832-833). The court cites other decisions with similar rulings.[15] Indeed, cases are legion under Title VII and other protective legislation, that hold discharge based on misconduct is not a violation.

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[15] Grimes v. U.S. Postal Serv., 872 F. Supp. 668, 675 (W.D. Mo. 1994), Richardson v. U.S. Postal Serv., 613 F. Supp. 1213, 1215 (D. D.C. 1985), Wilber v. Brady, 780 F. Supp. 837, 840 (D. D.C. 1992).

See also Leary v. Dalton, 58 F.3d 748, 753 (1st Cir. 1995) ("* * * [T]he [Rehabilitation] Act neither prevents employers from holding 'persons suffering from alcoholism * * * [to] reasonable rules of conduct,' nor protects alcoholics from the consequences of their own misconduct").

CONCLUSION

Petitioners were discharged because of their drug-related misconduct at the workplace. The Ninth Circuit correctly affirmed the district court's ruling that this did not violate the ADA. No court has ruled otherwise. There is no reasonable basis for this Court to review this ruling, which is clear from the face of the ADA and in accordance with rulings under other protective statutes.

Respectfully submitted,

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